FEDERAL CIRCUIT COURT OF AUSTRALIA

CHOPRA v MINISTER FOR IMMIGRATION & ANOR *[2017] FCCA 1081*

Catchwords:
MIGRATION – Application for student visa – whether the Tribunal erred in finding that the International English Language Testing System ("IELTS") report was a bogus document within the meaning of sub-s.5(1) of the *Migration Act 1958* (Cth) – no error by the Tribunal – application for judicial review dismissed.

Legislation:
Migration Act 1958 (Cth), sub-s.5(1), s.97
Migration Regulations 1994 (Cth), sch.2 cl.487.228, sch.4 cl.4020

Applicant:	CHANDAN CHOPRA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 1574 of 2015
Judgment of:	Judge Jones
Hearing date:	15 May 2017
Date of Last Submission:	15 May 2017
Delivered at:	Melbourne
Delivered on:	26 May 2017

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents:	Ms McInnes of the Australian Government Solicitor

ORDERS

(1) The Application for judicial review filed 9 July 2015 be dismissed.

(2) The Applicant pay the First Respondent's costs in a fixed amount.

(3)

(4)

(5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1574 of 2015

CHANDAN CHOPRA
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and Background

1. This is an application for judicial review of a decision of the then Migration Review Tribunal ("the Tribunal") dated 9 June 2015, affirming a decision of a delegate of the Minister for Immigration and Border Protection ("the Minister") to refuse to grant the Applicant a Skilled (Provisional) (Class VC) Subclass 487 visa ("the visa").

2. On 4 July 2012, the Applicant applied for the visa (CB 21-34). In the visa application, the Applicant stated that he had undertaken an International English Language Testing System ("IELTS") test on 10 December 2011 and achieved competent English (CB 32). The Applicant also provided an IELTS test report form dated 22 December

2011 in respect of a test undertaken on 10 December 2011, which recorded test results of 7.5 for listening, 9.0 for reading, 6.0 for writing, 7.0 for speaking and an overall band score of 7.5 ("the IELTS Report") (CB 35).

3. On 7 November 2013, the Department of Immigration and Border Protection ("the Department") wrote to the Applicant inviting him to comment on adverse information (CB 51-55). The letter informed the Applicant that when a case officer sought to verify the Applicant's IELTS Report, they were informed that the results were cancelled and the band score for each component of the test was reversed to "0". Further inquiries revealed that IELTS had cancelled the Applicant's test results due to an impostor sitting the test (CB 52).

4. On 30 April 2014, a delegate of the Minister ("the Delegate") refused to grant the visa (CB 61-66). The Delegate found that in order to meet the requirements of cl.487.228 of sch.2 to the *Migration Regulations 1994* ("the Regulations"), the Applicant had to satisfy Public Interest Criterion 4020 ("PIC 4020") (cl.4020 of sch.4 to the Regulations). The Delegate found that the IELTS report given to the Department was a bogus document, and therefore the Applicant did not satisfy PIC 4020.

5. At the time that the Applicant applied for the visa, cl.487.228 of sch.2 to the Regulations provided:

> *487.228*
>
> *The applicant:*
>
> > *(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4010 and 4020; and …*

6. Clause 4020 of sch.4 to the Regulations (PIC 4020) relevantly provided:

> *4020*
>
> *(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse the application;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

7. At the time that the Applicant applied for the visa, s.97 of the *Migration Act 1958* (Cth) ("the Act") (which later became s.5(1) of the Act and was applied at the time of the Tribunal decision) relevantly defined a "*bogus document*" as follows:

***bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:*

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

Review Application

8. On or around 16 May 2014, the Applicant applied to the Tribunal for review of the Delegate's decision (CB 67-76).

9. On 12 February 2015, the Tribunal issued a summons to IELTS to obtain documents relating to the investigations into the IELTS test undertaken by the Applicant on 10 December 2011 (CB 77-79).

10. On 27 February 2015, IELTS produced documents in response to the Tribunal's summons (CB 93-130).

11. On 7 April 2015, the Tribunal wrote to the Applicant, inviting him to attend a hearing scheduled for 14 May 2015 (CB 85-86).

12. On 14 May 2015, the Tribunal wrote to IELTS seeking further information about the investigation into the Applicant (CB 92). On 21 May 2015, IELTS responded to the Tribunal's summons advising that the Applicant's test was cancelled as there was a reasonable suspicion an impostor had undertaken the test, and setting out the details of the investigation (CB 91).

13. On 21 May 2015, the Tribunal wrote to the Applicant inviting him to comment on or respond to information that it considered would be the reason or part of the reason for its decision (CB 132-135).

14. On 4 June 2015 the Applicant responded to the Tribunal's invitation to comment through his then solicitor who was a registered migration agent (CB 136-138).

Tribunal Decision

15. The Tribunal made its decision on 9 June 2015 (Supplementary Court Book ("SCB") 1-11).

16. The Tribunal found that in order to demonstrate his eligibility for the visa, the Applicant was required to show that he had "*competent English*". One of the ways an applicant could demonstrate competent

English was to achieve a score of at least 6.0 in each of the 4 components in an IELTS test (SCB 4 at [12]).

17. The Tribunal identified that the question before it was whether, on the evidence before it, it should conclude that it "*reasonably suspects*" that the IELTS Report is a bogus document (SCB 7 at [30]). The Tribunal stated as follows (SCB 7 at [31]):

> *31. The Tribunal has considered the findings of the IDP that led to the decision to cancel the applicant's IELTS results from the 10 December 2011 test, and gives weight to the evidence upon which the findings were based rather than merely the fact that a decision had been made by IDP to cancel the results.*

18. The Tribunal found that there were differences between the voice recorded as part of the 10 December 2011 IELTS test and the Applicant's speaking voice at the hearing (SCB 8 at [32]). In addition, the Tribunal gave weight to the analysis by the International Development Program Education Pty Ltd ("IDP") (who administer the IELTS, and whom the Tribunal said are charged with conducting and ensuring the integrity of testing process) to the effect that there were differences between the voice recording for the 10 December 2011 test and the earlier test undertaken by the Applicant on 22 October 2011 (SCB 8 at [32]). The Tribunal concluded that there was a reasonable basis to suspect that an impostor undertook the speaking component of the 10 December 2011 test, and accordingly the results for the speaking component of the test purported to be but were not issued in respect of the Applicant. The Tribunal found that, therefore, the IELTS Report was a bogus document within the meaning of the Act (SCB 8 at [33]).

19. The Tribunal found that IDP made an assessment by comparison of the handwriting in the writing components of the 22 October 2011 and the 10 December 2011 tests, indicating that they were different (SCB 8 at [34]). On comparison of the October test results and a sample of the Applicant's handwriting provided to the Tribunal during the hearing, the Tribunal formed the view that the handwriting on the October test was the Applicant's handwriting (SCB 8 at [34]). The Tribunal further observed that the sample of the Applicant's handwriting appeared different from the handwriting in the 10 December 2011 test. This difference was not disputed by the Applicant (SCB 8 at [35]). The

Tribunal considered the Applicant's contention that the test results may have been compromised by the people who undertook the test (SCB 8-9 at [36]-[38]).

20. The Tribunal determined that there was a reasonable basis for suspecting that the IELTS Report was a bogus document, on the basis that the writing component was not undertaken by the Applicant but by another person, and the writing component score therefore purports to be, but was not, issued in respect of the Applicant (SCB 9 at [37]). The Tribunal found the Applicant's explanation for the difference to be "*highly speculative*" (SCB 9 at [38]), and found that its suspicion about the Applicant not having undertaken the writing component was reinforced by the fact that the Applicant was unable to recall the subject matter for the written test when asked about it at the hearing (SCB 9 at [39]).

21. The Tribunal concluded that the IELTS Report was a document that purported to be, but was not, issued in relation to the Applicant, and therefore was a bogus document (SCB 9 at [40]-[41]). The Tribunal further concluded that the Applicant provided or caused the document to be provided to the Department as part of his visa application (SCB 9 at [41]).

22. The Tribunal considered whether the requirements of sub-cl.4020(1) of sch.4 to the Regulations (PIC 4020(1)) could be waived under sub-cl.4020(4) of sch.4 to the Regulations (SCB 10 at [43]-[51]). The Tribunal considered the Applicant's circumstances, however was not satisfied that there were compelling circumstances affecting Australia or compelling or compassionate circumstances affecting an Australian citizen, permanent resident, or eligible New Zealand citizen, that justified the grant of the visa (SCB 10 at [48]).

23. The Tribunal concluded that as the Applicant did not satisfy PIC 4020, he did not meet cl.487.228 of sch.2 to the Regulations (SCB 10 at [50]). The Tribunal therefore affirmed the decision of the Delegate.

Judicial Review

24. The Applicant's grounds for judicial review are contained in an affidavit filed by the Applicant on 9 July 2015 with his application. The grounds are in the form of a submission.

25. In essence, in his grounds of review, the Applicant concedes that both the handwriting and the voice recording in the IELTS Report are different to the Applicant's handwriting and voice. However, he asserts that because the IDP file containing its investigation of the 10 December 2011 IELTS test contains a photograph of the alleged imposer which is in fact a photograph of the Applicant, the evidence from the IDP file was compromised and should not have been taken into account or relied on by the Tribunal. The Applicant notes that he had drawn this issue to the Tribunal's attention, but the Tribunal has "*considered it* reasonable *to concentrate on handwriting and voice recording – ignore the alleged photo of the imposter*". The Applicant said at [13] and [14] of his affidavit:

> *13. It should be pointed out, that the Applicant believes the Tribunal erred in its interpretation of the evidence it had before it from IDP. The Tribunal considered it* reasonable *to concentrate on handwriting and voice recordings – ignore the alleged photo of the imposter.*
>
> *14. The Applicant believes that the entire IDP file was compromised and incomplete evidence and the Tribunal had no basis to find that it was reasonable to determine that the Applicant had instigated or so how profited from a fraud that had occurred involving his file and personal details.*

26. This ground of review was in fact raised by the Applicant, through his representative, in his response to the Tribunal's correspondence dated 21 May 2015. In his response, date 4 June 2015, the Applicant said (CB 138 at [9]):

> *Further to our commentary in* paragraph 8 above*, it is submitted that the IDP file of the Applicant as presented to the Department has been seriously compromised and should not be accepted as credible.* ***In particular, when the alleged perpetrator of the alleged fraud (as claimed) who was photographed on the day of the examination instead of our client – is indeed, the actual Applicant.*** *There is no explanation provided how it is alleged by*

> *IDP-INDIA that the photo of alleged fraudster is also the **actual photo** of the Applicant. Indeed, the manner in which IDP has handled this file in particular, and in providing the "evidence" we submit is to be discarded. There has been no clear identification of the actual fraudster. Therefore, any reliance on the IDP evidence is to so say "dubious".*
>
> 27. (emphasis in original)

28. At the hearing, the Applicant was self-represented and assisted by an interpreter in the Punjabi and English languages. The Applicant told the Court that, as the writing component of the test was four years ago, it was unreasonable of the Tribunal to expect him to remember the subject matter of that test. The Applicant insisted that he was at the exam and was not sure what went wrong. He also referred to his difficult personal circumstances, and the consequences for him if he cannot obtain the visa. He also referred to the fact that the identification document on the file included a photograph of himself, thus establishing that he undertook the IELTS test.

29. I am satisfied that the Tribunal gave active consideration to the Applicant's submission that the fact that the IDP file on the investigation into his 10 December 2011 IELTS results contained his photograph (which was said to be one of the alleged imposter, but was in fact a photograph of the Applicant) had the effect that all the evidence in the IDP file, including the evidence regarding the writing and speaking component of the IELTS test, was compromised.

30. First, in considering the speaking component of the 10 December 2011 IELTS test, the Tribunal said (SCB 8 at [32]):

> *... Although it is evident that passport identification was provided at this time which satisfied the examiner that the candidate was the applicant, this evidence is not conclusive that the candidate was indeed the applicant. In this regard, the Tribunal notes that it is in the very nature of identity fraud that a document will commonly be used to persuade another that a person is who they claim to be in circumstances where they are not.*

31. Secondly, in considering the writing component of the 10 December 2011 IELTS test, the Tribunal said (CB 9 at [38]):

> *38. The Tribunal has considered the submission that this issue has occurred with the writing component not through any deliberate action by the applicant but rather possibly through an internal administration error on the part of IDP, in mixing up the writing responses of two separate candidates. Notwithstanding the evidence of photographic passport identification having been provided and the IDP/IELTS system containing a photograph which certainly appears to be one of the applicant, the Tribunal finds the explanation of an inadvertent mixing of two different candidates written answers, to be highly speculative, and considers it more likely that an imposter undertook at the very least the answers to the writing component of the 10 December 2011 test. The absence of a clear explanation as to how an imposter was able to satisfy identity checking does not dispel the suspicion that a person purporting to be the applicant undertook the writing test on his behalf on 10 December 2011, as there may be various ways that an imposter may use to undermine the identity verification process. As observed above, this is generally an intrinsic element of any offence involving identity fraud. Furthermore, although the IDP/IELTS photograph of the testing candidate is indeed a photograph of the applicant, this does not of itself go to demonstrate that only the applicant sat and undertook each of the four separate testing components in the test on 10 December 2011.*

32. In respect of the writing component of the 10 December 2011 IELTS test, the Tribunal then went on to state (CB 9 at [39]):

> *39. The Tribunal's suspicions in regard to the applicant not having undertaken the 10 December 2011 written component of the test are enforced by the fact that the applicant was unable to recall any of the subject matter for the writing component in the test in his oral evidence to the Tribunal, either in the subject matter in the written answer booklet provided by IDP or indeed any other subject matter for a written component which the applicant may otherwise have completed.*

33. I am not satisfied that it was unreasonable for the Tribunal to expect the Applicant to recall the subject matter of the writing component of the IELTS test. Even if it were unreasonable, the substance of the Tribunal's findings about the writing component of the test was set out at [38] of the Tribunal decision record. In essence, the Tribunal found the Applicant's submission that there was an inadvertent mixing of two different candidates by the IDP to be "*highly speculative*", and further, that the mere fact that there was a photograph of the Applicant in the

IDP file did not demonstrate that the Applicant sat each of the four components of the IELTS test.

34. Not only did the Tribunal consider the Applicant's submission but, in my opinion, the Tribunal's reasoning in rejecting this submission, was cogent and open to the Tribunal.

35. I am satisfied that the Tribunal made factual findings that were open to the Tribunal in determining whether it was satisfied that it "*reasonably suspects*" that the document (the IELTS Report) purports to have been issued, but was not issued, in relation to the Applicant, by reference to writing and speaking components of the IELTS test.

36. It seems to me that the Applicant, in his oral submission, sought an impermissible merits review of the Tribunal decision.

Conclusion

37. For the reasons set out in this judgment, I am not satisfied that the Tribunal engaged in jurisdictional error.

38. Orders will be made dismissing the Application for judicial review and requiring the Applicant to pay the First Respondent's costs in a fixed amount.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Judge Jones

Date: 26 May 2017